ASSOCIATION OF AMERICAN RAILROADS

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May 20, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice served December 6, 2010 (as amended March 22, 2011), attached please find the Reply Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In its Advance Notice of Proposed Rulemaking ("ANPR") served December 6, 2010 (as amended January 20, 2011), the Surface Transportation Board ("STB" or "Board") instituted a proceeding to address the liability of warehousemen and similar third party car receivers for demurrage. The Board's ANPR arises out of recently-divided case law in the federal courts of appeals on the issue of whether a warehouseman (or other party that is not the beneficial owner of the freight being shipped) is subject to liability for demurrage if it is named as consignee in the bill of lading and accepts rail cars, but later claims it did not know of, or did not assent to, consignee status.[1] The Board "institut[ed] this proceeding in an effort to update [its] policies regarding responsibility for demurrage liability and to promote uniformity in the area," and requested public comment on several legal and factual matters to assist the Board in resolving the "third-party car receiver" demurrage liability issue through a rulemaking or policy decision. ANPR at 2.

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[1] Specifically, in *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) ("*Novolog*"), the Third Circuit held that a named consignee is subject to liability for demurrage unless it complies with the consignee-agent provisions of 49 U.S.C. § 10743(a)(1). In *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) ("*Groves*"), *cert. denied* ___S. Ct. ___ (Jan. 18, 2011), the Eleventh Circuit held that a named consignee was not subject to liability unless it agreed to be named as consignee, or at least had notice that it was being named as consignee. See ANPR at 4-5.

The AAR filed opening comments on March 7, 2011. In its opening comments, the AAR noted the importance of the demurrage system and that there is a need for national uniformity and certainty in the law to make the demurrage system effective. The AAR also noted that the *Novolog* and *Groves* courts actually agreed on most of the fundamental principles that govern the application of the demurrage system to the named consignee in a bill of lading and urged that the Board not disturb those principles. The AAR also noted that, to the extent that the *Novolog* and *Groves* courts parted ways in applying those principles, the *Novolog* court's analysis more accurately reflected the governing statute, policy objectives and practical aspects of demurrage. Accordingly, the AAR urged that the Board endorse the Third Circuit's ruling in *Novolog* that a named consignee is subject to liability for demurrage despite claims that it never assented to, or lacked knowledge of, its status.

The AAR also noted that the Board could help restore uniformity to the treatment of third-party intermediaries in courts bound by the *Groves* decision by making clear, for courts bound by *Groves,* that a named consignee should be subject to liability for demurrage as long as the named consignee has an opportunity to learn of its status, either from the railroad, the shipper or some other source, so it can invoke the consignee-agent provisions of 49 U.S.C. § 10743(a).

Opening comments were also filed in this proceeding by several individual Class I AAR member railroads,[2] the Indiana Harbor Belt Railroad Company ("IHB") and several parties representing third party car receivers.[3] In its reply comments, the AAR concurs in the comments of its Class I railroad members and responds to the comments of the other parties.

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[2] Individual comments were filed by BNSF Railway Company ("BNSF"), the Canadian Pacific Railway Company ("CP"); CSX Transportation, Inc. ("CSXT"), Norfolk Southern Railway Company ("NS") and the Union Pacific Railroad Company ("UP").

[3] Comments on behalf of third party car receivers were filed by the International Association of Refrigerated Warehouses ("IARW"), the International Warehouse Logistics Association ("IWLA"), and Savannah Re-Load.

As discussed infra at 4-9, the AAR generally supports the comments of the IHB (a reciprocal switching carrier serving the greater Chicago area) with respect to the direct liability for demurrage charges of third party car receivers located on its lines and believes that its position is both consistent with the fundamental demurrage principles recognized in *Novolog* and *Groves* and essential for the efficient movement of rail cars through the vital Chicago hub. For the reasons detailed in the AAR's opening comments, and as further noted below, the AAR believes that the comments of the third party car receivers seeking to avoid or minimize their demurrage liability are without merit and should be rejected by the Board.[4] The AAR also addresses other contentions raised by these parties in their comments.

As urged in its opening comments, the Board should endorse the Third Circuit's ruling in *Novolog* that the consignee named in the bill of lading is subject to liability for demurrage regardless of any claim that it did not know of, or assent to, being named as consignee. The Board should also explain to courts bound by *Groves* that a named consignee should be considered to have appropriate notice of its status as long as it had an opportunity to learn of its status from the shipper, the railroad, or another party, and invoke the consignee-agent provisions of section 10743(a)(1).

On April 15, 2011, long after the March 7, 2011 due date for filing opening comments, Freeport Logistics, Inc. ("Freeport"), a "third party logistics" ("3PL") warehouse, filed a two-page letter containing additional comments with the Board. Because Freeport's letter submission generally reiterates contentions made by IARW and IWLA in their opening comments, which contentions are addressed by the AAR in its reply comments, the AAR sees no need to specifically reply to Freeport's late-filed submission.

[4] Although the third party car receivers filing opening comments in this proceeding generally support the outcome in *Groves*, none of those parties engages in a detailed analysis of the *Novolog* and *Groves* decisions. The AAR accordingly sees no need to reiterate in its reply comments the legal and policy arguments in support of the *Novolog* approach as set forth in its opening comments. Instead, the AAR will focus its reply comments on the specific issues raised by the third party car receivers in their opening comments.

Discussion

I. Comments of the IHB

The IHB is a switching and terminal railroad operating in the greater Chicago area. It connects with every Class I carrier, many regional roads and short line carriers and provides switching service to over 140 receivers of which "almost 50...can be designated as either warehouses or transload type facilities." January 24, 2011 IHB Comments at 1 ("IHB Comments"). The IHB further notes that its receivers "have located on the IHB based on ...the IHB's access to multiple carriers, which opens their terminals as being accessible (through reciprocal switching arrangements) to ship and receive products from virtually anywhere in North America." *Id.*

The IHB notes that it "has always taken the position that the industry that is located on the siding that the IHB is servicing is fully responsible for all demurrage and storage charges associated with any cars that are delivered and pulled at their facility." *Id.* It notes in support of its position that (*inter alia*): (1) when an industry locates on the IHB, the industry executes a side track agreement governing division of ownership, maintenance, and liability and is required to complete a credit application (*id.*); (2) the IHB "does not hold any legal document that would provide IHB with assurance that [any] outside [business] concern is willing and able to take responsibility for the demurrage and storage charges" (*id.*); (3) the "intermediaries are the only party to the transaction that can control all the steps of the transaction" (i.e., "the beneficial owner cannot order the spotting of the freight car into the facility, or control the unloading of the railcar, or the handling of the freight within the facility") (*id.* at 2); (4) the intermediaries are the only parties that can gain demurrage credits for prompt release of cars (*id.* at 2); and (5) it is the experience of the IHB that "the intermediaries do not accept freight without a formal notice or

commitment, but only after their customer, the beneficial owner, has entered into a contractual commitment" with them that likely includes compensation for demurrage charges. *Id* at 2.

The IHB further notes that "[it] does not have the information or documentation to prove who the responsible party is for the product being shipped or received" and that "as a reciprocal switch carrier [it] is not a party to the original bill of lading and is not shown in the interline routing of the car on the bill of lading or waybill." *Id* at 2. It further notes that " [w]hen receiving traffic for delivery to an IHB industry, the complete EDI waybill information is normally suppressed during the transmission, providing IHB with only basic delivery information and excluding key data such as consignor, origin station, beneficial owner, payer of freight, etc." *Id.* The IHB also emphasizes that the intermediary that controls the facility is in the best position to optimize the unloading process. *Id.*[5]

The AAR fully concurs in the IHB's position that receivers located on IHB's sidings, including warehouse and transload facilitites, are properly held by IHB to have direct demurrage liability for delay in returning railcars to the system. The AAR believes that such position is fully consistent with the governing principles of demurrage as noted in both *Novolog* and *Groves*, effectively serves the underlying policy goals of the demurrage provisions, and is essential to the efficient movement of railcars through the most important rail hub in the nation.

As noted in *Novolog* and *Groves*, the general demurrage rule under governing law is that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, *or others by statute, contract, or prevailing custom.*" See *Novolog* at 254-55 (and

[5] The IHB also notes that often the beneficial owner of the goods may be a foreign entity that is beyond IHB's financial and practical reach with respect to recovery of demurrage charges, and that several commodities it transports are actively traded on commodity markets, pass through several beneficial owners prior to reaching final destination and there is no clear responsibility for tracing who the beneficial owner may be. *Id.* 2.

cases cited); *Groves*, at 1277-1278 (and cases cited) (emphasis added). The criteria of the general demurrage rule are readily satisfied under the conditions noted in IHB's comments.

First, receivers served at IHB's sidings appear to have *voluntarily* entered into implicit contractual arrangements with IHB to be directly responsible for demurrage charges as a condition of IHB service regardless whether or not they are named as consignee on the original bill of lading (to which IHB is not a party and is not privy to essential shipping information as to otherwise responsible parties). The arrangement between IHB and its receivers thus constitutes a fully consensual contractual relationship governing demurrage liability recognized as controlling in both *Novolog* and *Groves*.

Second, the only waybill information that IHB is privy to when it receives a railcar for delivery is the name of the receiver located on its line that has been designated as consignee. Because IHB's receivers are directly responsible for, and effectively control all aspects of, the car receiving and handling process at the IHB sidings (and are the only parties entitled to receive demurrage credits from IHB), the IHB has no option other than to presume that IHB's receivers are acting on their own behalf, and not as agents of the shipper or beneficial owner of the goods (parties unknown to IHB), for car handling and demurrage purposes *vis a vis* the IHB.[6] Indeed, as noted by IHB, no parties other than IHB's receivers have undertaken responsibility *vis a vis* the IHB for payment of demurrage charges and there is no claim by IHB's receivers as to agency status with respect to demurrage liability. The fundamental principles allocating demurrage liability to parties designated as consignees in the applicable shipping instructions and not known

[6] Moreover, an essential element of an agency relationship is the principal's "effective control" over the activities of its agent. See, e.g., *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 34 (2004) ("*Kirby*") (quoting from *Restatement (Second) of Agency*, Sec. 1 (1957). Such "effective control" by an outside party appears completely lacking with respect to the car handling activities of IHB's receivers as they relate to demurrage charges.

by the delivering carrier to be acting as agents of a named beneficiary (through notice under 49 U.S.C. § 10743 or otherwise) are thus fully applicable to IHB's receivers.

Finally, as effectively described by the IHB in its comments, the *prevailing custom* with respect to allocation of liability for demurrage charges regarding receivers located on IHB's sidings in the Chicago rail hub clearly places direct liability for demurrage charges on the IHB's receiver. As noted in both *Novolog* and *Groves*, "prevailing custom" is of equal status to a statutory provision or contractual agreement for purposes of allocation of demurrage liability. See *Novolog* at 254-55; *Groves*, at 1277-1278. That such a prevailing custom exists in the Chicago hub is further bolstered by IHB's general experience that demurrage liability issues arising between IHB's receivers and the outside parties with which they have a commercial relationship (including with respect to detailing the circumstances, if any, under which IHB's receivers may be entitled to reimbursement for demurrage charges) appear to be handled solely through separate contractual arrangements between such parties and do not involve the IHB.

Indeed, IHB's relationship with all of its receivers-- including warehousemen and transloaders-- with respect to the imposition of direct liability for demurrage charges on the receiver itself, not only is consistent with current law governing demurrage, but also makes eminent practical sense and effectively serves the policy objectives underlying the demurrage provisions in the most important—as well as the most congested-- rail hub in the nation. Any rail transportation backups at the Chicago hub—or any major rail hub-- would have strong ripple effects throughout the entire rail network. There thus must be especially strong and effective incentives in place to ensure the prompt and efficient return of railcars by receivers served by a reciprocal switching carrier such as the IHB in the Chicago hub. Those incentives, as the IHB's long-established customary demurrage practice makes clear, require *at minimum* that the

responsibility for the prompt return of railcars—and the direct responsibility for demurrage liability for any delay in returning railcars to the network—be placed on the party actually handling the railcar on the sidings served by the IHB.

II. Comments of Third Party Car Receivers

The comments of the third party car receivers generally seek to avoid responsibility for demurrage charges at their facilities to the maximum extent possible and to allocate liability for such charges to their shipper customers (or other outside parties) who do not control the car handling functions at such facilities and who are otherwise unwilling to voluntarily assume demurrage liability for car handling delays at such facilities. The efforts of the third party car receivers to avoid demurrage liability (except where otherwise voluntarily assumed under an express contractual agreement with the carrier) should be rejected by the Board as contrary to the statutory scheme and inconsistent with the policy objectives underlying the demurrage provisions.

The AAR also responds to various other assertions or proposals raised in the comments of the third party receivers.

A. The Third Party Car Receivers Are the Parties in the Best Position to Ensure the Prompt Handling of Railcars at Their Facilities and, Where Named as Consignees on the Bill of Lading, Are Appropriately Held Responsible under Long-Established Demurrage Principles for Demurrage Charges Resulting From Failure to Promptly Return Railcars to the National System

1. Third party intermediaries may be appropriately named by the shipper/consignor as consignee on the bill of lading where such intermediaries are not acting as agents of the shipper/consignor or other identified parties for purposes of demurrage liability.

The representatives of third party car receivers IARW and IWLA (but not Savannah Re-Load, an individual warehouseman/transloader) raise various objections to third party

intermediaries being named as consignees on the bill of lading by the shipper/consignor and assert various reasons why such action should be viewed as the result of mistake or as otherwise improper. The Board should reject such blanket assertions as without factual or legal predicate and as counterproductive to the policy objectives underlying the statutory demurrage scheme.

The third party intermediary representatives generally attempt to avoid demurrage liability by asserting that such intermediaries are virtually always acting as "contractual agents" of another party (usually the shipper). The IARW, for instance, contends that "the relationship between the public warehouse operator and its customer (the shipper and/or consignee) is governed by... contract." January 24, 2011 IARW comments at 2 ("IARW Comments"). The IARW further notes that under the "standard terms and conditions for storage approved by IARW for its members" (*id.* at 2), "public warehouse operators receive goods that are transported to their warehouses for storage and other warehouse services... *as agents for their customers* for the receipt of those goods." IARW Comments at 3 (emphasis added). IARW accordingly contends that "on shipments into the warehouse, the public warehouse should, by contract between the warehouse operator and its customer, be identified only as the 'in care of party' [on the bill of lading]." *Id.* at 2. In IARW's view, "the intermediaries (public warehouse operators) should not be liable to the rail carriers for demurrage charges unless they enter into separate written agreements with the rail carriers...." *Id.* at 3.

The IWLA takes a comparable position on behalf of its members (termed "3PL Warehouses" or "third-party warehouse based logistics providers"). IWLA notes that "IWLA 3PL Warehouses have spent significant time and resources sending multiple notifications to their [customers] that ship by rail that they should never be named as the consignee." See January 21, 2011 IWLA Comments at 1, 5 ("IWLA Comments"). The IWLA also points out that 'the

Standard terms and Conditions promulgated by the IWLA specifically addresses demurrage issues and the improper characterization of 3PL Warehouses," and IWLA cites to a standard term that would require its members' "Depositor" (i.e., its shipper customer) to always identify the warehouse as the "in care of party" and not the consignee, and to name the Depositor as consignee. IWLA comments at 1, 5. IWLA accordingly claims that "3 PL warehouses cannot be held liable for being improperly named" and that "[t]he railroads must establish best practices for correcting their procedure of misidentifying parties." Id. at 5.[7]

In contrast to the general assertions by IARW and IWLA that third party intermediaries are virtually always operating as "contractual agents" of another party (generally the shipper),[8] Savannah Re-Load explicitly acknowledges that third party intermediaries such as warehousemen and transloaders are often *not* acting as agents for their customers.[9] As noted by Savannah Re-Load, "*warehousemen are often not agents for their customers. Several of Savannah Re-Load's customers have, through contract, expressly disclaimed any agency relationship.* July 24, 2011 Comments of Savannah Re-Load at 3 ("Savannah Re-Load Comments") (emphasis added).

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[7] As pointed out by AAR in its opening comments, the bill of lading information relating to the named consignee is provided by the *shipper/consignor* to the carrier, not the carrier to the shipper/consignor as IWLA implies. It is thus the responsibility of the shipper/consignor and the named consignee (who share a commercial relationship) to establish "best practices" for accurately stating the de facto status of the parties designated on the bill of lading.

[8] The IWLA's "standard contract terms and conditions" referenced by IWLA in its comments would have the "Depositor" (i.e., the shipper) name itself as the consignee and the warehouse as the "in care of party." See Comments of IWLA at 5. IARW similarly asserts that that 'Usually the consignee on shipments to public warehouses is the shipper, although sometimes the consignee will be the shipper's customer who purchased the goods from the shipper. In either event...the public warehouse should, by contract between the warehouse operator and its customer, be identified only as the "in care of party." See Comments of IARW at 1-2.

[9] Indeed, in conflict with its general assertion that 3PL Warehouses are always performing services as agents of its "Depositors" (i.e., shipper customers) and that the Depositor should always be named as the consignee on the bill of lading, *IWLA itself qualifies such assertion* in response to Board Question 5 by noting that *"[i]n many instances,* 3PL Warehouses are acting as agents for their customers when receiving goods." IWLA comments at 7. The only inference from this statement is that in many instances 3PL warehouses are *not* acting as agents for its shipper Depositors as frankly admitted by Savannah Re-Load in its comments. IWLA makes no attempt to explain the discrepancies in its assertions.

It is thus apparent from the conflicting comments of IARW, IWLA and Savannah Re-Load that there is often no "agency" agreement between the shipper and the third party intermediary that would allow the third party intermediary to avoid demurrage liability by providing notice of agency under the provisions of 49 U.S.C. §10743 or that would otherwise negate the presumptive "consignee" status of the third party intermediary where named as consignee in the bill of lading. Although the IARW and IWLA may proffer their "standard terms and conditions" to shippers, and urge acceptance of their "standard contract" forms, it is apparent that those standard terms and conditions are often expressly declined by the shipper who does not agree to voluntarily assume demurrage liability for the car handling practices of the third party intermediary at the intermediary's own facilities.

IWLA also proffers an additional argument for avoiding demurrage liability based on the status of a third party intermediary as a mere warehouse performing storage functions for its shipper customers. As contended by IWLA, "3 PL Warehouses are not per se 'intermediaries' as it relates to the transport of goods. Instead, it is our position that as 3PL Warehouses, our function (contractually and otherwise) is outside the transport of goods." *Id* at 3. IWLA further acknowledges that "in many instances our depositors are also shippers who contract with rail carriers," but argues that "we have no beneficial interest in those goods that our depositors ship. Nor do we have any direct contractual relationship to the rail carriers." *Id.*

IWLA's position that its warehouse members perform functions that are "outside the transport of goods" is not credible. Warehousemen, transloaders, pier facilities and other third party intermediaries operate as vital links in the rail transportation chain in performing functions at their facilities related to the receipt, handling and return of railcars, the unloading and loading of goods, the transloading of goods from one mode of transportation to another, and the

forwarding of goods to beneficial owners or to other parties at their ultimate destination. See, e.g., *Novolog,* 502 F.3d at 250; *Groves*, 586 F. 3d at 1275 (and cases cited). Such parties have always been viewed by the Board, the ICC and the courts as part of the transportation chain and as performing important transportation functions for which they may be subject to demurrage liability where named as consignees in the bill of lading. *Id.*; see also ANPR at 3 (expressly noting the role of third party intermediaries such as warehousemen in the transportation chain and the circumstances under which they may be held liable for demurrage (e.g., where they are named as consignees in the bill of lading and are not acting as known agents of another party)).

Indeed, in its comments IWLA itself specifically notes that issues of demurrage are commonly addressed in the agreements between IWLA members and their customers and that the contracts vary by customer "on issues like how many cars they will accept, how long they are allowed to unload, indemnity for demurrage claims by railroads, limits on amount of demurrage per day/month, etc." IWLA Comments at 6.[10] The very fact that demurrage issues are specifically addressed in IWLA's agreements with its customers is clear testimony that the functions performed by its warehouse members are not "outside the transport of goods."[11]

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[10] The IWLA also specifically recognizes that an effective demurrage system serves its members' purpose as necessary to ensure the efficiency of the rail network. See IWLA Comments at 1 ("Third-party warehouse logistics suppliers ("3PL Warehouses") cannot function without an efficient transportation system and demurrage and detention contribute towards making that system more efficient"). The IWLA nevertheless denies that its warehouse members play an important role in ensuring the effectiveness of the demurrage system.

[11] Savannah Re-Load specifically concedes in its comments (as it must) that "the warehouseman certainly has a role to play in the accumulation of demurrage." Savannah Re-Load comments at 1.

Although not raised by Savannah Re-Load in its comments in this proceeding, Savannah Re-Load took the position in the *Groves* case (as defendant before the District Court)) that it was not responsible for demurrage because it was merely acting as an *"independent contractor"* and did not expressly agree to assume liability for demurrage (emphasis added). See March 7, 2011 NS comments at 21. Although the long-established principles governing demurrage allow a named consignee to avoid demurrage liability by providing the carrier with notice of its agency status and the identity of its principal responsible for demurrage charges prior to delivery of the goods (as recognized at common law and in the provisions of 49 U.S.C. § 10743), the law makes no exception for demurrage liability for a named consignee that merely asserts that it is acting as an "independent contractor" in accepting goods from the carrier. Indeed, any such asserted "defense" would directly conflict with longstanding demurrage principles and would provide no incentives for the prompt return of railcars from the "independent contractor's" facility

IWLA's assertion that it should not be held liable for demurrage because it is not a beneficial owner of the goods shipped is also contrary to the long-standing principles underlying demurrage liability. The case law clearly recognizes that, although a beneficial owner may be *ipso facto* liable for demurrage charges, a named consignee does not have to be the beneficial owner of the goods shipped to be properly held liable for demurrage charges. Under governing law, "[l]iability for freight charges may be imposed... against *a consignor, consignee, or owner of the property,* or others by statute, contract, or prevailing custom." *See Novolog* 502 F.3d at 254-55; *Groves*, 586 F.3d at 1277-1278 (emphasis added). Indeed, the case law explicitly recognizes that a warehouseman, transloader or other third party intermediary that is not the beneficial owner of the goods may be properly held liable for demurrage where it is named as the consignee on the bill of lading and is not acting as a known agent of another. See *Novolog,* 502 F. 2d at 254-255, 257 n. 10; *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse,* 337 F. 3d 813, 821-822 (7th Cir. 2003) ("*South Tec*"); *Middle Atl. Conference v. United States,* 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel) ("*Middle Atlantic*"); *Blanchette v. Hub City Terminals, Inc.,* 683 F.2d 1008, 1010-11 (7th Cir. 1981) (consolidators of shipments named as consignors/ consignees on the bills of lading found subject to demurrage liability even though not beneficial owners of the goods shipped).

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contrary to the underlying policy objectives of the demurrage provisions. Under the demurrage scheme, a "consignee", in normal meaning and normal use, is defined as "[o]ne to whom goods are consigned." *Black's Law Dictionary* 327 (8th ed. 2004). See also Federal Bills of Lading Act (49 U.S.C. §80101 (1)) ("'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered'"). Although the law governing demurrage recognizes that a consignee who is acting only as an agent on behalf of a disclosed principal and who provides the requisite advance notice of agency under 49 U.S.C. § 10743 may avoid liability for demurrage, there are no other exceptions in the law that would excuse a named consignee from demurrage liability. In short, an "independent contractor" named as consignee in the bill of lading who is not acting as an agent for a disclosed principal and who accepts the goods from the carrier cannot avoid liability for demurrage charges with respect to the handling of cars at its facility. As summarized in *Novolog,* "under the statutory scheme, the named consignee can avoid liability in two ways: first, by refusing the freight...; and second, by providing the carrier timely written notice of agency under section 10743 (a)(1), if appropriate." *Novolog,* 502 F.3d at 259; accord *Groves,* 586 F.3d at 1279. There is no exception under the statutory scheme from demurrage liability for named consignees who are not acting as agents and merely assert "independent contractor" status.

The IWLA's further contention that a separate contractual relationship between the third party intermediary and the carrier is necessary before the third party intermediary may be held liable for demurrage is also misguided. The law governing demurrage expressly recognizes that a party named as consignee in the bill of lading generally becomes a party to the transportation contract and subject to liability for demurrage upon acceptance of the goods. The named consignee does not need to enter into a separate contractual relationship with the carrier to incur demurrage liability. *Novolog*, 502 F.3d at 254-55 (and cases cited); *Groves*, 586 F.3d at 1278-79 (and cases cited); see also March 6, 2011 AAR Comments at 8-9 ("AAR Comments").

2. Third party car receivers are in the best position to ensure the prompt handling of railcars at their facilities and the policy objectives of the demurrage provisions would be clearly served if such parties were held presumptively liable for demurrage charges where they are named as consignee on the bill of lading and do not provide the carrier advance notice of an agency relationship under the consignee-agent provisions of 49 U.S.C. § 10743.

Savannah Re-Load takes issue with the Board's statement in the ANPR (at 5) that "because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C. § 10746 (efficient use of freight cars)." Savannah Re-Load concedes that the Board's statement is correct as it applies "to the handling of the rail cars after delivery," but claims that demurrage can also arise from other factors beyond the warehouse's control such as the shipper's failure to properly regulate the flow of traffic into the warehouse facility or carrier delivery practices that "bunch" railcars into the warehouse facility for greater efficiency. Comments of Savannah Re-Load at 1-2.

The Board's observation in the ANPR is clearly correct. The warehouse/transloader is indeed in the best position to deal with and control the traffic flowing into its facility from the

shipper and to unload and return railcars to the carrier as efficiently as possible, and it should have strong incentives under the demurrage system to do so.

First, to the extent that Savannah Re-Load's comments contend that undue delays in returning railcars to the delivering carrier by the warehouse facility (and liability for demurrage) may at times be attributable to carrier actions, current law would not hold the warehouse consignee liable for demurrage under such circumstances (assuming the consignee's claim is supported in fact) and the AAR does not seek to change existing law as it relates to circumstances where the carrier itself is the cause of demurrage. [12] The issue in this proceeding, however, is the allocation of demurrage liability to warehouse facilities where the carrier is *not* the cause of demurrage and the AAR urges that the warehouse itself is clearly in the best position to avoid demurrage situations from arising in the first instance.

As noted in the AAR's opening comments, the carrier's defined role in providing transportation services under governing law is to follow the shipper's instructions on the bill of lading and to deliver the goods received from the shipper to the consignee named in the bill of lading as efficiently as possible. See AAR Comments at 13. The bill of lading is the contract for transportation; the carrier has no commercial dealings with either the shipper or the named consignee and has no control over their business relationship. As correctly noted by the Board "the warehouseman is the one who has the relationship with the shipper." ANPR at 5; see also *Novolog,* 502 F.3d at 259.

Because only the warehouseman has a direct commercial relationship with the shipper, it is the only party that can ensure that the shipper abides by any agreement or arrangement with

[12] Whether carrier "bunching" or switching practices are the cause of demurrage in a specific case is based on the specific factual circumstances presented. Moreover, carrier practices in delivering cars to a warehouse facility in "bunches" rather than one at a time generally provides for more efficient rail transportation services as Savannah Re-Load itself recognizes. *Id.* at 2; IWLA also takes issue with carrier bunching of cars for delivery but similarly acknowledges that carrier delivery of cars in bunches "may promote efficient rail traffic." IWLA Comments at 4.

the warehouseman governing the flow of traffic into the warehouse facility or to otherwise prevent the shipper from sending cars to its facility that are beyond its capacity to handle efficiently. It is also the warehouseman that is directly responsible for its own actions after delivery in receiving, unloading, and returning the railcar to the network as promptly as possible.

Indeed, the warehouseman's ability, responsibility *and customary contractual practice* to deal directly with the shipper in providing the terms and conditions for the delivery of goods to its facility, including issues related to traffic flow, facility capacity, reimbursement for demurrage liability, and other demurrage issues are clearly demonstrated by the comments of IWLA and IARW detailing their specific arrangements with their shipper customers on such issues. See IWLA comments at 6; IARW comments at 2-3.

As the Board correctly recognized in the ANPR (at 5), there are "valid transportation reasons for putting [demurrage] liability on the party best able to release the railcars (the warehouseman) or to decline the cars if it knows that its facility is overcrowded." Accordingly, the Board is emphatically correct that the policy objectives underlying the demurrage provisions would be most effectively served by the *Novolog* court's approach of making the warehouseman/transloader (or other third party intermediary) named as consignee on the bill of lading presumptively liable for demurrage unless it provides the carrier with advance notice of agency as required under the consignee/agent provisions of 49 U.S.C. § 10743.

III. The Advance Written Notice of Agency Required under 49 U.S.C. § 10743 Must Be Predicated on An Actual, *Bona Fide* Agency Agreement Between the Third Party Intermediary and the Shipper/Consignor (or Other Party Expressly Assuming Liability for Demurrage at the Third Party Intermediary's Facilities); Moreover, Unless Specifically Agreed to in Advance by the Carrier, the Shipper/Consignor and the Third Party Intermediary, Such Notice Must Be Provided to the Carrier on a Shipment-by-Shipment Basis to Satisfy the Requirements of Section 10743

In its comments, IWLA contends that it "has developed a standard notice letter for 3PL Warehouses to use" that purportedly serves to advise the carrier that the 3PL Warehouse should never be named in the bill of lading as consignee. IWLA Comments at 7. The standard notice letter developed by IWLA would advise the carrier that "[i]n the event XYZ Warehouse Company's name appears as consignee on any bill of lading...in relation to goods being delivered to the Warehouse, it is a mistake. XYZ Warehouse Company is only the 'in care of party' and is not the consignee." *Id.* IWLA further complains that although it recommends to its members that the letter be sent 'certified mail return receipt requested,' "[u]nfortunately, many of the railroads have refused to accept or acknowledge the notice letter." *Id.*

The AAR submits that the IWLA's blanket, standard-form notice letter fails to comply in any respect with the advance notice of agency requirements of 49 U.S.C. § 10743 and that the Board should reject the use of such blanket form letters as a means by which third party intermediaries may avoid liability for demurrage charges.[13]

As discussed supra at 10-12, the conflicting comments of IARW, IWLA and Savannah Re-Load clearly demonstrate that there is often no actual "agency" agreement between the shipper and the third party intermediary that would allow the third party intermediary named as

[13] IWLA also contends that the advance notice of agency requirements of 49 U.S.C. §10743 should not be read as applicable to demurrage charges but only to freight charges. IWLA comments at 8. The AAR disagrees with IWLA's narrow interpretation of section 10743 for the reasons set forth in its opening comments. AAR Comments at 19-23. The IARW, moreover, agrees with the *Novolog* and *Groves* courts' findings (and the AAR's position) that the provisions of 49 U.S.C § 10743 apply to demurrage charges. See IARW comments at 2.

consignee on the bill of lading to avoid demurrage liability by providing notice of agency under the provisions of 49 U.S.C. §10743. Accordingly, third party intermediaries are properly named as consignees in the bill of lading by the shipper/consignor where no agency agreement exists, and such designation is not always "a mistake" as IWLA would have it.

The blanket "notice" proffered by IWLA's members is thus not an actual notice of agency as required under 49 U.S.C. §10743, but is simply a unilateral attempt by IWLA and its members to shift demurrage liability to the shipper/consignor (or some other unnamed party) in *all* cases, even where the third party intermediary is not acting as an agent of the shipper/consignor (or another party) and where neither the shipper/consignor (nor any other party) has agreed to assume liability for demurrage at the third party intermediary's facilities as 49 U.S.C. § 10743 expressly requires.

The Board should accordingly reject the use of a blanket "notice of agency" form by a named consignee as a means of avoiding demurrage liability. The Board should require that the advance notice of agency required to be provided to the carrier by the named consignee under 49 U.S.C. § 10743 : (1) be predicated on an actual, *bona fide* agency agreement between the third party intermediary and the shipper/consignor (or other party expressly assuming liability for demurrage at the third party intermediary's facilities); and (2) provide the carrier with the name of the party that has specifically agreed to assume demurrage liability at the third party intermediary's facilities for the shipment at issue.

The AAR also urges that the Board require that the notice of agency under 49 U.S.C. § 10743 be provided to the carrier on a shipment-by-shipment basis (unless other arrangements are expressly agreed to between the shipper/consignor, the third party intermediary and the carrier). The language used in the provisions of 49 U.S.C. § 10743 specifically contemplate notice on a

shipment-by-shipment basis where there has been an incorrect designation of an agent as consignee, and the Board should implement the notice provision consistent with the statutory language. [14] Moreover, if there is indeed any actual inadvertent "mistake" made by the shipper/consignor (or other party providing the bill of lading instructions to the carrier) in designating as consignee a third party intermediary that should have been properly designated as an "in care of" party, such inadvertent "mistake" would likely be made with respect to a specific shipment of goods rather than on a wholesale, blanket basis. Accordingly, the Board should require that the advance notice required by 49 U.S.C. § 10743 be provided by the named consignee on a shipment-by-shipment basis to correct inadvertent errors in its designation as pertains to specific shipments.

However, as long as *all* affected parties agree (e.g., the shipper/consignor (or other party assuming liability for demurrage), the third party intermediary, and the delivering carrier), the AAR would not object to a more generalized form of advance notice of an agreed-upon agency relationship as sufficient under 49 U.S.C § 10743. Such notice should be limited to the named parties, specifically designate the third-party intermediary as agent for a named principal and specifically recite that the named principal will assume all liability for demurrage at the third-party intermediary's facility for the shipments covered by the notice.

IV. Savannah Re-Loads' Proposal That Liability for Demurrage Should Be Apportioned Based on Fault as Determined Through Case-by-Case Litigation Is Contrary to Governing Demurrage Liability Principles and Is Unworkable

Savannah Re-Load does not dispute that a third party intermediary such as a warehouseman/transloader should be held liable for demurrage where it is the party that causes

[14] The provisions of 49 U.S.C. § 10743 (a) (1) contemplate that the consignee-agent providing the notice provide specific notice of "the agency and the absence of beneficial title" and "the name and address of the beneficial owner of the property...." The language accordingly recognizes that the beneficial owner of the goods may vary on a shipment-by-shipment basis and the required notice should accordingly reflect each shipment's respective circumstances.

the demurrage. Savannah Re-Load Comments at 3-4. Savannah Re-Load, however, proposes that in each case, demurrage liability should be apportioned between the shipper, carrier, car owner, consignee, warehouseman/transloader, *et al.*, "based upon responsibility for causing it" as determined on a case-by-case basis through litigation proceedings before judge and jury. *Id.* at 4. As explained by Savannah Re-Load, the issues in each proceeding would include:

> "Did the warehouseman solicit too much business or did the shipper send too much freight knowing the warehouseman's capacity? Did the carrier bunch? If so, should the warehouseman have refused the delivery? A jury can decide these issues after considering the facts and circumstances of each lawsuit on a case by case basis."

Id.

The Board should reject Savannah Re-Load's proposal as contrary to the statutory scheme and underlying policy objectives of the demurrage provisions and as unworkable.

In order for the demurrage system to perform its statutory functions and effectively serve the policy objectives underlying the provisions of 49 U.S.C. § 10746, the statutory scheme requires that there be "clear, easily enforceable rules for liability." *Novolog,* 502 F.3d at 257. The governing demurrage principles perform this function by generally directing the economic incentives of the demurrage scheme at the party in the best position to efficiently receive the railcars, load and/or unload the freight, and return the rail cars to the carrier as promptly as possible. As explained in the ANPR, the existing scheme does this through carrier tariffs typically assessing demurrage "on the 'consignor' (the shipper of the goods) for delays at origin and on the 'consignee' (the receiver of the goods) for delays at destination." ANPR at 3.[15]

[15] See, e.g., *Novolog*, 502 F. 3d at 251 (citing to CSXT demurrage tariff provision providing that "Unless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for payment of demurrage charges."); *Groves*, 586 F.3d, at 1276 (citing to NS's demurrage tariff providing that "Demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment").

To provide even greater certainty in the rules and to maximize the economic incentives to avoid demurrage, the existing demurrage system also does not require a carrier to prove "fault" on the party handling the railcars at origin or destination in order to impose demurrage charges. Unless the carrier itself is responsible for the demurrage, a shipper or receiver is generally held liable for demurrage charges at origin or destination respectively regardless of any required proof of fault if it retains the cars beyond the "free time" period allotted under the carrier's tariff.[16] See, *Groves*, 586 F.3d at 1276 ("to promote car efficiency by providing a deterrent against undue detention...demurrage charges are properly assessed even if the cause for the delay is beyond the party's control, unless the carrier itself is responsible for the delay") (internal citations omitted); *accord, CSX Transp., Inc. v. Meserole St. Recycling*, 618 F. Supp. 2d 753, 771 (W.D. Mich. 2009); *Union Pac. R. Co. v. U. S.*, 490 F.2d 1385, 1389-90 (Ct. Cl. Jan. 23, 1974); *Pennsylvania R.R. v. Moore-McCormack Lines, Inc.*, 370 F.2d 430, 432 (2d Cir. 1966), *aff'g* 246 F.Supp. 143 (S.D.N.Y.1965); *Chrysler Corp. v. New York Cent. R.R.*, 234 I.C.C. 755, 757-758 (1939).

The Board should reject Savannah Re-Load's proposal to overhaul the existing demurrage system by turning it into a "fault-based" system administered by the courts. The demurrage liability system proposed by Savannah Re-Load would eliminate the clarity, certainty and uniformity of the existing rules governing demurrage liability and would make effective application of the policy objectives underlying the statutory demurrage provisions difficult or impossible to achieve.

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[16] Under the existing rules, the shipper and the consignee are free to resolve any demurrage liability issues among themselves through voluntary agreements governing demurrage terms and conditions, including conditions providing for reimbursement of demurrage charges under specified circumstances. See *Novolog*, 502 F. 3d at 259; see also, e.g., comments of IARW and IWLA.

As emphasized by the *Novolog* court, "For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail system by creating incentives against delays, railways must be able to assess them effectively without being mired in disputes." *Novolog,* 502 F.3d at 259. Under Savannah Re-Load's proposal, in each case (whether the demurrage arose at origin or destination) the shipper, consignee, warehouse/transloader or other party potentially responsible for demurrage charges would have strong incentive to shift blame to another for causing the demurrage and require the carrier to initiate long, drawn-out litigation proceedings to successfully allocate demurrage liability among the involved parties. Moreover, while the litigation is pending, the carrier would presumably not be able to effectively impose and collect demurrage charges from any party in the interim, but would be drawn into, and have to await, the outcome of the pending litigation. The economic incentives underlying the demurrage system would thus become dissipated in the ensuing litigation proceedings and lose their essential primary function of encouraging the prompt return of railcars by the car-handling party.

Further, under such a scheme, the effective implementation of the policy objectives underlying the demurrage system would no longer be uniformly administered by the Board under the provisions of 49 U.S.C § 10746 and the applicable case law. It would instead be effectively delegated to the vagaries of the judicial system where demurrage liability determinations would be allowed to vary from jurisdiction to jurisdiction and from case to case predicated solely on the various juries' differing views of "fault." This is not the regulatory scheme Congress established when it enacted the demurrage provisions of 49 U.S.C. § 10746, and it is not a scheme that the Board is authorized to accept.[17]

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[17] Savannah Re-Load's proposal also seeks to change the substantive rules governing demurrage in other respects that are beyond the scope of this proceeding. For example, in the case of warehousemen, Savannah Re-Load would require that "actual placement of railcars on his siding should signal the start of his demurrage liability...because [t]his signals the start of the portion of the supply chain in which the warehouseman has actual control over the

Conclusion

The Board should endorse the Third Circuit's ruling in *Novolog* that the consignee named in the bill of lading is subject to liability for demurrage regardless of any claim that it did not know of, or assent to, being named as consignee. The Board should also explain to courts bound by *Groves* that a named consignee should be considered to have appropriate notice of its status as long as it had an opportunity to learn of its status from the shipper, the railroad, or another party, and invoke the consignee-agent provisions of section 10743(a)(1).

Respectfully Submitted,

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railcars and could actually cause a delay." *Id.* at 3. Savannah Re-load's proposal is not only inconsistent with the long-established demurrage principles recognizing the propriety of carrier rules applicable to constructive placement, but also overlooks the fact that when the warehouseman solicits more business than it can handle, or accepts more cars from the shipper than are beyond its capacity to handle, the warehouseman is directly responsible for requiring the carrier to place the cars that the warehouse cannot handle in constructive placement (which would appropriately start the demurrage period running).